

Commonwealth Of Kentucky
Court of Appeals

NO. 2018-CA-000510-WC

JOHN PARKER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-00337

SEBREE MINING, LLC;
HON. JOHN C. MCCrackEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER AND MAZE, JUDGES; HENRY, SPECIAL JUDGE.¹

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

MAZE, JUDGE: John Parker petitions for review of a March 2, 2018, opinion by the Workers' Compensation Board (Board) that affirmed an October 18, 2017, opinion and order of the Administrative Law Judge (ALJ) dismissing his claim for injuries he allegedly sustained while working for Sebree Mining, LLC ("Sebree"). Parker argues that he is entitled to reconsideration based upon a full and accurate understanding of the evidence supporting his claim. We find no evidence that the ALJ substantially misunderstood the evidence. Because substantial evidence supported the ALJ's determination, we affirm the Board's order.

Parker was born in 1951 and worked for forty-three years as an underground coal miner. Parker's work history reveals he worked at numerous coal mines and sustained multiple injuries over the years prior to working for Sebree. He began working for Sebree in February 2015, and his last day of employment with Sebree was November 6, 2015. During his employment with Sebree, Parker worked as a belt inspector and filled in for belt mechanics if they were absent. Parker stated he missed no work during his nine-month employment with Sebree. In fact, he missed no work for any reason during his last twenty-five years of employment as a coal miner. He last worked for Sebree on November 6, 2015, after he declined to be transferred to a different part of the mine. The mine eventually closed in January 2016.

On February 23, 2017, Parker filed a Form 101 alleging cumulative trauma to his back, neck, and shoulders over the course of his forty-three years working in underground coal mines. Parker testified he injured his right knee in 1980, and that he underwent surgery for that condition in 1987 and again in the early 1990's. Additionally, he testified that he was injured in a rock fall while working for a previous employer, which caused fractures of his L3, L4, and L5 vertebrae. He did not undergo surgery for that injury.

In support of his claim, Parker filed records from his chiropractor, Dr. Juan Nunez, and his family physician, Dr. Anthony Starkey. Dr. Nunez's records reflect Parker's treatment for various levels of cervical and lumbar complaints with pain radiating into his shoulders, hips, and legs. Dr. Starkey treated Parker for complaints of low back, shoulder, neck, left arm and right foot pain. His diagnoses included lumbar disc degeneration, left arm pain, skin paresthesia, lumbar myelopathy, cervical disc disorder with myelopathy, calcific tendinitis, right foot pain, and plantar fibromatosis.

Parker also filed the February 28, 2017, report of Dr. Daniel S. Brown, who evaluated him on January 17, 2017. Dr. Brown, an occupational and environmental physician, diagnosed Parker with cervical spondylosis without myelopathy, intermittent cervical radiculopathy, chronic neck pain and dysfunction, lumbar spondylosis with myelopathy, possible intermittent right

radiculopathy, chronic low back pain and dysfunction, left rotator cuff syndrome, chronic left shoulder pain and dysfunction, left hand injury of June 2015 with probable fracture per history, chronic left hand pain and dysfunction, right wrist osteoarthritis, chronic right wrist pain, bilateral knee osteoarthritis-right greater than left, and chronic knee pain/dysfunction. He opined all of those conditions were caused by cumulative trauma associated with work in underground coal mining with the exception of the left hand. He stated the right wrist condition was caused by using a hammer as a cane.

Dr. Brown assessed a 55% impairment rating pursuant to the 5th Edition of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). Of this rating, he found 8% is due to the cervical condition, 8% is due to the lumbar condition, 8% is due to the left shoulder, 10% is due to the right wrist, 12% is due to the left hand, 12% is due to the left knee, and 16% is due to the right knee. Dr. Brown opined Parker does not retain the capacity to return to the type of work he performed in the coal mines.

In response, Sebree filed the May 10, 2017, report from Dr. Christopher Stephens, who evaluated Parker at its request. Dr. Stephens noted Parker's complaints of daily low back pain with occasional right lower extremity numbness and neck pain approximately two times per week. Dr. Stephens noted he had reviewed records from Drs. Starkey, Nunez, and Brown. He diagnosed

Parker with daily low back pain due to a combination of old compression fractures, isthmic spondylolisthesis and degenerative disc disease, and neck pain occurring two days per week secondary to spondylosis. Dr. Stephens found no evidence that Parker has any impairment as related to cumulative traumatic injury, and he assigned Parker no restrictions for his cervical or lumbar spine.

Sebree also submitted the report of Dr. Daniel Primm, who evaluated Parker at its request on May 19, 2017. Dr. Primm diagnosed Parker with a history of left shoulder strain with current examination showing signs of mild left shoulder bursitis/ impingement, primary osteoarthritis of the right wrist, left long finger MP joint fracture with probable post-traumatic arthritis involving that joint, status post right knee injury, subsequently requiring two arthroscopic surgeries, and a history of lumbar fractures. Dr. Primm saw no evidence of any specific cumulative trauma to the knees, shoulder, wrists or hands. He found Parker had reached maximum medical improvement for any condition, regardless of causation, and would assess no restrictions. He believed Parker retained the capacity to return to the type of work performed at the time of the alleged injury. Dr. Primm noted he would assess a 3% impairment rating to the left shoulder and hand pursuant to the *AMA Guides*.

In an opinion and order issued October 18, 2017, the ALJ noted Parker missed no work for Sebree until he was laid off. In dismissing the claim, the ALJ stated Parker might very well experience pain in his neck and low back.

However, the ALJ found that Parker had not satisfied his burden of proving he sustained work-related cumulative trauma injuries while working for Sebree.

The ALJ subsequently denied Parker's petition for reconsideration. On further review, the Board found Parker's appeal "to be nothing more than a re-argument of the evidence before the ALJ." The Board concluded that the ALJ accurately summarized the evidence and acted within his discretion by relying on the opinions of Drs. Stephens and Primm.

In his petition for review to this Court, Parker argues that the ALJ's decision was not based upon an accurate understanding of the evidence. On factual questions, Parker, as the claimant, had the burden of proof. Since he was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, it is within the ALJ's discretion alone to judge the weight to be afforded to and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky. App. 1995). The ALJ may choose to accept or reject any testimony, or to believe or disbelieve any part of the

evidence, regardless of whether it hearkens from the same witness or the same adversary party's total proof. *Magic Coal v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

Thus, on appeal, mere evidence to the contrary of the ALJ's decision is not sufficient to require a reversal. *Id.* Rather, in order to reverse the decision of the ALJ below, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence is defined to mean evidence of relevant consequence which would induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). The function of this Court's review of the Board is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Parker points to his uncontradicted testimony that he used his right hand and wrist to use a hammer as a cane while maneuvering in tight sections of the mine. He maintains that this evidence, along with Dr. Brown's report, would have supported a finding that his nine months of work with Sebree caused or contributed to the progression of cumulative trauma injuries to his neck, low back and right wrist, citing to *Passmore v. Lowes Home Ctr.*, No. 2008-SC-000224-WC, 2008 WL 5274855 (Ky. Dec. 18, 2008), Parker contends that the ALJ's failure to

consider this evidence makes it impossible to determine whether the ALJ's dismissal was the product of reasonable inferences based upon a consideration and accurate understanding of all of the evidence. *Id.* at *3.

But in *Passmore*, the Board found that the ALJ's recitation of the evidence contained apparent misstatements or misunderstandings which rendered the basis for the decision unclear. *Id.* at *1.² In the current case, the Board found that the "ALJ accurately summarized the evidence and had a complete understanding of the issues before him." While Parker introduced evidence which could have supported a different determination by the ALJ, we agree with the Board that this evidence did not compel a contrary conclusion. Therefore, we are not at liberty to disturb the ALJ's determination.

Accordingly, we affirm the Board's order affirming the ALJ's opinion and order dismissing Parker's claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Springer, III
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Brandy B. Hassman
Lexington, Kentucky

² In any case, Parker cited to *Passmore* pursuant to CR 76.28(4)(c). Since *Passmore* is not published, the case is not binding authority on this Court.